



DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2022-0127]

Controlled Substances and Alcohol Use and Testing: Application for Exemption; The Trucking Alliance

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that it has received an application for exemption from The Trucking Alliance, a group comprised of the following motor carriers: Cargo Transporters; Dupré Logistics LLC; Frozen Food Express; J.B. Hunt Transport, Inc.; KLLM Transport Services; Knight Transportation; Maverick Transportation LLC; Schneider; Swift Transportation; USXpress; and May Trucking Company. The Trucking Alliance applied for an exemption from the Federal Motor Carrier Safety Regulations (FMCSRs) “to amend the definition of actual knowledge to include the employer's knowledge of a driver's positive hair test, which would require such results be reported to the FMCSA Drug and Alcohol Clearinghouse ("Clearinghouse") and to inquiring carriers.” Although FMCSA lacks the statutory authority to grant the Trucking Alliance’s request for exemption until the Department of Health and Human Services has taken certain action, FMCSA requests public comment on the exemption application, as required by statute.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER.]**

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Number FMCSA-2022-0127 by any of the following methods:

- **Federal eRulemaking Portal:** www.regulations.gov. See the **Public Participation and Request for Comments** section below for further information.
- **Mail:** Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.
- **Hand Delivery or Courier:** West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.
- **Fax:** (202) 493-2251.

Each submission must include the Agency name and the docket number (FMCSA-2022-0127) for this notice. Note that DOT posts all comments received without change to www.regulations.gov, including any personal information included in a comment. Please see the **Privacy Act** heading below.

Docket: For access to the docket to read background documents or comments, go to www.regulations.gov at any time or visit Room W12-140 on the ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

Privacy Act: In accordance with 49 U.S.C. 31315(b), DOT solicits comments from the public to better inform its exemption process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov. As described in the system of records notice DOT/ALL 14 – FDMS, which can be reviewed at <https://www.transportation.gov/privacy>, the comments are searchable by the name of the submitter.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards, FMCSA, at (202) 366-2722 or by e-mail at MCPSPD@dot.gov. If you have questions on viewing or submitting material to the docket, contact Dockets Operations at (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA-2022-0127), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to www.regulations.gov and put the docket number (“FMCSA-2022-0127”) in the “Keyword” box, and click “Search.” When the new screen appears, click on the “Comment” button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-

addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315(b) to grant exemptions from FMCSRs. FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The Agency must publish its decision in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption and the regulatory provision from which the exemption is granted. The notice must specify the effective period and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Applicant's Request

The Trucking Alliance applied for “an exemption from 49 CFR 382.107 to amend the definition of actual knowledge to include the employer's knowledge of a driver's positive hair test, which would require such results be reported to the FMCSA Drug and Alcohol Clearinghouse ("Clearinghouse") and to inquiring carriers as required to comply with 49 CFR 391.23.”

A copy of The Trucking Alliance's application for exemption is available for review in the docket for this notice.

IV. Statutory Requirements for FMCSA's Drug and Alcohol Testing Program

FMCSA drug and alcohol use and testing regulations are authorized by the Omnibus Transportation Employee Testing Act of 1991 (OTETA) (Pub. L. 102-143, Title V, 105 Stat. 917, at 952, codified at 49 U.S.C. 31306). Section 31306(c)(2) requires that DOT follow the Department of Health and Human Services' (HHS) Mandatory Guidelines for technical and scientific testing issues. Thus, while DOT has discretion concerning many aspects of the regulations governing testing in the transportation industries' regulated programs, DOT and FMCSA must follow the HHS Mandatory Guidelines for the laboratory standards and procedures used for regulated testing. Therefore, allowing the use of a non-DOT drug test to serve as the basis for an actual knowledge report under 49 CFR part 382 is contrary to OTETA.

FMCSA notes that in section 5402(b) of the Fixing America's Surface Transportation Act (FAST Act) (Pub. L. 114-94, 129 Stat. 1548, codified at 49 U.S.C. 31306 note) (Dec. 4, 2015)), Congress required that the U.S. Department of Health and Human Services (HHS) "not later than one year after ... this Act, ... issue scientific and technical guidelines for hair testing as a method of detecting the use of a controlled substance for purposes of section 31306 of title 49, United States Code." The FAST Act also amended OTETA by adding a requirement that FMCSA's drug and alcohol testing regulations permit the use of hair testing as an acceptable alternative to urine testing for pre-employment drug testing, and for random drug testing when the driver was subject to pre-employment hair testing (49 U.S.C. 31306(b)(1)(B)). The Conference Report accompanying the FAST Act noted that "[t]he FMCSA has informed the conferees, and the conferees agree that *nothing in section 5402 authorizes the use of hair testing as an alternative to urine tests until the U.S. Department of Health and Human Services establishes federal standards for hair testing*" (emphasis added).[H.R. Rep. 114-357, at 506 (Dec. 1, 2015)]

HHS issued proposed Mandatory Guidelines for Federal Workplace Drug Testing Using Hair (HMG) in 2020 (85 FR 56108 (September 10, 2020)). However, HHS has not yet issued a final version of the HMG.

V. Request for Comments

In accordance with 49 U.S.C. 31315(b), FMCSA requests public comment from all interested persons on The Trucking Alliance's application for an exemption from 49 CFR 382.107. All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the Addresses section of this notice. Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

Larry W. Minor,
Associate Administrator for Policy.

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